IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPEAL NO. 418 OF 1989

THE STATE OF MAHARASHTRA) ... APPELLANT

vs

1. SATISH SHIVA JADHAV)

2. YUVRAJ BHIVA JADHAV)

3. ARUN ANNA JADHAV)

All are R/o Malwadi, Taluka)

Satara, Dist. Satara) .. RESPONDENTS

Mr. D. S. Mhaispurkar, APP

Mr. M. S. Mohite for respondents

CORAM:-SMT. RANJANA DESAI &

A. S. OKA, JJ.

DATED:-27-10-2004

ORAL JUDGMENT:-(Per Smt. Ranjana Desai, J.)

We find from the farad that on 31-7-03 the Division Bench of this Court had directed the office to verify whether this appeal pertains to Single Judge. We have perused the appellate side rules. As per Rule II (a) of Chapter I Part I of Bombay High Court,

Appellate Side Rules, 1960, appeal against acquittals wherein the offence with which the accused is charged is one punishable on conviction with a sentence of fine only or with a sentence of imprisonment not exceeding ten years or with such imprisonment and fine shall be dealt with by Single Judge. All other appeals are obviously to be dealt with by the Division Bench. Considering the fact that respondents were charged with Section 326 of the Indian Penal Code ("I.P.C." for short) this appeal will have to be heard by this court.

2. Respondents ("accused 1 to 3 respectively" for convenience) were tried in the court of 4th Joint J.M.F.C. Satara in Regular Criminal Case No. 260 of 1987 for offences under Sections 326, 324, 323 r.w. 34 of the I.P.C. By her judgment and order dated 28.2.89 the learned Judge acquitted the accused of the charges levelled against them. Being aggrieved by the said judgment and order the State of Maharashtra has preferred this appeal to this court.

3. At the trial the case of the prosecution was as follows:

On 10.7.87 at about 5-15 p.m. the complainant, PW 2 Jaysing Jadhav and his mother were coming towards Malwadi. The accused suddenly attacked the complainant near a borewell. Accused 3 Arun gave two blows with axe on the head of the complainant. Accused 1 Satish gave blow with iron bar on the back of the complainant. Accused 3 Arun assaulted the complainant with cycle chain. The complainant's mother intervened but she was assaulted by the accused by fist blows and kicks.

4. PW 1 Tarabai came to the borewell to fetch water. When she tried to intervene accused 1 gave a blow of iron bar on her face which landed on her upper lip. The complainant and PW 1 Tarabai sustained serious injuries. The police arrived there. The injured were carried to the police station. Since they were seriously injured police admitted them in the Civil Hospital Satara. At about 7 p.m. the police called the Executive Magistrate PW 5 Shashikant Panditrao. He recorded the dying declaration of the complainant in which the complainant stated that the accused had assaulted him. Thereafter the offence came to be registered vide C.R. No. 81 of 1987. The case papers were handed over to A.S.I. Khan at about 10 p.m. The accused were arrested on the same night. The investigation was started on the basis of the complaint. After completion of the investigation the accused came to be charged as aforesaid.

5. In support of its case the prosecution examined as many as 8 witnesses, out of which PW 1 Tarabai and PW 2 Jaysing Jadhav are the injured witnesses. The prosecution also examined PW 3 Bhanudas Kale and PW 4 Dilip Jadhav, who claim to have seen the incident. PW 6 Dr. Vinite Mahajani deposed about injuries sustained by the prosecution witnesses. The details of the investigation were given by PW 7 A.S.I. Khan.

6. The defence of the accused was one of denial. According to the accused the complainant is on inimical terms with many of his relations. He has deserted his two wives and is now living with his third wife. There was no reason for the accused to assault him and the complainant must have been assaulted by some unknown persons. In support of their case the accused examined defence witness Kalu Jadhav. After perusing the evidence on record, the learned Judge acquitted the accused as aforesaid and hence

this appeal.

7. We have heard Mr. Mhaispurkar, the learned APP in support of the appeal and Mr. Mohite, learned counsel appearing for the respondents. With the help of the learned counsel, we have gone through the evidence and record of the case.

8. The charge framed against the accused is in respect of injuries caused to PW 1 Tarabai Jadhav, PW 2 Jaysing Jadhav and Hirabai, mother of Jaysing Jadhav. Though the prosecution witnesses have referred to attack made on Hirabai, Hirabai is not examined. There is no explanation offered as to why she was not examined. Similarly there is also reference to attack made on one Godabai but there is no charge with regard to the attack on Godabai. Therefore, so far as the evidence of the prosecution witnesses relating to the alleged assault on Hirabai and Godabai is concerned, we propose to leave it out of consideration.

9. Mr. Mhaispurkar, the learned APP contended that the impugned judgment and order of acquittal is perverse and deserves to be set aside. He submitted that the evidence of injured witnesses is consistent as regards attack made on them by the accused. The injury certificates corroborate their evidence. The learned Judge has completely ignored these facts. Mr. Mhaispurkar submitted that in the circumstances, the impugned order be quashed and set aside and the accused be convicted in accordance with law. Mr. Mohite, learned counsel for the respondents on the other hand submitted that the prosecution has failed to prove its case beyond reasonable doubt. He submitted that the learned Judge has rightly considered the discrepancies in the evidence of the witnesses

and acquitted the accused. Mr. Mohite submitted that the view taken by the trial court is a reasonably possible view which does not deserve to be disturbed in this appeal against acquittal. He therefore, urged that this court should dismiss the present appeal.

10. Before we deal with the evidence and the submissions advanced by the learned counsel, it is necessary to have a look at the medical evidence PW 6 Dr. Vinite Mahajani, was the medical officer attached to Civil Hospital, Satara. He examined PW 2 Jaysing Jadhav on 10.7.87. He issued medical certificate Exh. 25. As per the medical certificate, Jaysing had received the following injuries;

1) Incised wound over right frontoparietal region. 2" x Y2" bone deep' bleeding +++' - Grievous Injury.

2) Contusion linear over back 2" x 6" - Simple injury.

3) Abrasion over right forearm over dorsai aspect 1 cm diameter - Simple injury.

4) Incised wound over right parietal region. bleeding ++' 3" XY2" bone deep - grevious injury.

5) Haematoma Left Side of back. - Simple Injury.

3 in cm diameter' over subscapular region

Object ; grevious injury - sharp & hard.

Simple injury - blunt & hard.

Dr. Mahajani also examined PW 1 Tarabai on the same day and issued medical certificate Exh. 26. Injuries suffered by Tarabai are as under:

1) CLW 2" X Ys" over right upper lip. Muscle deep

bleedings +++ - Simple injury.

2) Broken right upper middle and lateral incisors

- grevious injury.

Object - Hard & blunt object.

Age of the wound - Recent' within 24 hrs.

It is clear from the evidence of Dr. Mahajani that both Jaysing and Tarabai had received grevious injuries.

11. PW 1 Tarabai has stated in her evidence that on the day of incident at about 5-30 in the evening, she had gone to fetch water from the borewell. At that time the complainant Jaysing was coming from the road. The accused were sitting by the side of the road. Accused 3 Arun had axe in his hand. He gave two blows of axe on the head of the complainant. Accused 1 Satish was having a pointed iron bar in his hand. He gave a blow with it on the back of the complainant. Accused 3 Arun assaulted the complainant with cycle chain. When she went to rescue the complainant, accused 1 Satish gave a blow with iron bar on the upper right side of her lip on account of which she sustained bleeding injury. Her one teeth got detached. According to her accused 1 Satish assaulted complainant's mother with fist and gave her kick blows. Thereafter they were carried to the hospital at Satara.

12. In her cross-examination certain omissions have been brought on record. It appears that she had not stated before the police that accused 3 had given two blows with the axe

on the head of the complainant and that accused 1 had given a blow with iron rod at the back of the complainant and accused 2 had assaulted the complainant with cycle chain. So far as injury received by her on her upper lip which resulted in dislocation of her teeth is concerned, she is consistent. She has stated that accused 1 Satish gave a blow with iron bar on the upper right side of her lip. There is no omission sofar as that part of her evidence is concerned. Sofar as assault made by accused 3 is concerned, the omission appears to be only as regards number of blows given by him.

13. PW 2 Jaysing has stated that accused 3 Arun gave him two blows with axe on his hand and accused no. 1 Satish gave a blow with iron rod on his back and arm. At that time his aunt i.e. P.W. 1 Tarabai intervened. Accused No. 1 Satish gave blow with iron bar on the upper side of her right lip. According to him he became unconscious due to the assault. He was taken to the civil hospital. On the next day morning his statement was recorded by the police which is at Exhibit 18.

14. In his cross-examination it is brought on record that he has not assigned any particular role to any of the accused in his statement. That appears to be true. His statement was recorded on 10.7.87 by the Special Executive Magistrate Satara, Mr. Panditrao who is also examined by the prosecution. The said statement was recorded as a dying declaration. Since Jaysing has survived, obviously it cannot be used as a dying declaration. At the most it could be used as a prior statement of Jaysing. It is true that Jaysing has not assigned any role to any of the accused but the fact remains that names of all the accused are noted in this statement. It was contended by Mr. Mohite that it is stated by this witness in the court that after assault he became unconscious and, therefore,

he could not have seen the entire incident. However it is pertinent to note that in his cross-examination he has clarified that he did not become unconscious immediately after receiving blow with the axe. The fact that names of the accused are mentioned in the statement of Jaysing is of great significance. Though no role is assigned to any of the accused by him, the medical evidence establishes that this witness was brutally assaulted and he sustained grevious injuries. His presence can hardly be doubted.

15. The prosecution has then examined PW 3 Bhanudas Kale. Bhanudas Kale claims to be an eye-witness. According to him on the day of the incident he was standing in front of his house. Complainant and his mother were coming from the road. They came near the borewell. PW 1 Tarabai had gone to fetch water from the borewell. Accused Arun rushed towards complainant with axe in his hand and accused Satish rushed towards him with iron rod. Accused Yuvraj also rushed towards the complainant. Accused Arun gave two axe blows on the complainant on his head. Mother of the complainant rushed to the spot. She intervened to rescue the complainant but the accused assaulted her with fist blows and kicks. Witness Tarabai also went to rescue the complainant but the accused Satish gave a blow with iron bar on her upper left lip on the right side. Witness Tarabai and the complainant sustained bleeding injuries.

16. In his cross-examination only one omission has been brought on record i.e. as regards accused Arun giving two axe blows to the complainant. So far as attack on Tarabai is concerned, no omission has been brought on record.

17. The prosecution has also examined PW 4 Dilip Jadhav. Dilip Jadhav also claims to

have seen the incident. He has stated that on the day of the incident he was standing at the door of his house after returning from his work. Jaysing and his mother were coming from the road. They came near the borewell. Accused Arun rushed to the complainant and assaulted him with axe on his hand. Accused Satish assaulted him with iron bar and accused Yuvraj assaulted him with fist blows. At that time his mother Tarabai came to fetch the water at the borewell. She intervened. Mother of Jaysing also tried to intervene. Accused Satish gave blow with iron rod on his mother. It landed on the lip of his mother. In his cross-examination only one omission is brought on record i.e. as regards accused 1 Satish giving blow with iron bar on the complainant. As regards attack on Tarabai, there is no omission.

18. Evidence of the eye-witnesses appear to us to be consistent on the core of the prosecution case. All the witnesses are consistent as regards the injury caused to Tarabai. We have already noted the nature of the injury. Doctor has certified it to be a grevious injury.

19. The witnesses are also consistent as regards injury caused to Jaysing by Accused 3 Arun. It appears that the omission is with regard to the number of blows. In any case sofar as PW 4 Dilip Jadhav is concerned, on this aspect no omission has been brought on record and the injury sustained by Jaysing speaks for itself.

20. In our opinion, therefore, evidence adduced by the prosecution establishes the prosecution case that PW 1 Tarabai and PW 2 Jaysing received grevious injuries at the hands of accused 1 and 3. The defence has examined one witness i.e. DW 1 Kalu Jadhav.

Kalu Jadhav has stated that on the day of incident it was dark and cloudy and it was rainy season. What is sought to be conveyed is that the accused could not have been identified on account of lack of visibility. We are not at all happy with the evidence of this witness. We do not understand the purpose for examining this witness. The injuries sustained by the prosecution witnesses and the consistent evidence of the witnesses clearly proves the prosecution case as against accused 1 and 3. The evidence of DW 1 Kalu Jadhav in our opinion does not further the defence case.

21. We have gone through the impugned judgment. In our opinion, the learned Judge has given undue importance to minor discrepancies in the evidence of the prosecution witnesses. The learned Judge has not applied her mind to the medical evidence at all. We do not find any discussion on the medical evidence in the judgment. So far as eye-witnesses are concerned there is no proper marshalling of their evidence. The fact that two of the eye-witnesses are injured has not weighed with the learned Judge at all. She has given importance to facts like, it is not clear how the accused were taken to the police station and why the time of arrest of the accused is not mentioned. We are of the opinion, that these minor defects in the investigation ought not to have weighed with the trial court to the extent of acquitting all the accused.

22. In our opinion, so far as accused 2 Yuvraj is concerned, the prosecution has not led any consistent and cogent evidence to link him with the incident in question. However, prosecution has established its case that PW 1 Tarabai was assaulted by accused 1 Satish with iron bar which caused grevious injury to her and accused 3 Arun assaulted PW 2 Jaysing causing him grevious injury. Therefore, so far as these two accused are

concerned their order of acquittal will have to be set aside. In our opinion, they will have to be sentenced under Section 325 of the I.P.C. So far as their sentence is concerned, Mr. Mohite, learned counsel appearing for the accused contended that almost 15 years have elapsed from the date of the incident. During this period the accused have led a peaceful life. They are not involved in any crime and, therefore, a kindly view of the matter be taken and the sentence already undergone by the accused be treated as sentence for this offence.

23. In our opinion, there is some substance in the submission of Mr. Mohite as regards sentence to be imposed on the accused. Considering the fact that much time has elapsed from the date of the incident and that during this period the accused have not indulged in any criminal activities, we feel that interest of justice will be served if the sentence undergone by accused 1 and 3 is treated as sentence for offence under section 325 of the I.P.C. In addition to that, in our opinion, the accused must be ordered to pay Rs.5,000/- each as fine. In default of payment of fine they must be made to suffer R.I. for six months each. Hence the following order:

"The acquittal of accused 2 Yuvraj Bhiva Jadhav under the impugned judgment and order dated 28.2.87 passed by the IV Jt. C.J., J.M.F.C. Satara in Regular Criminal Case No. 260/87 is confirmed.

The acquittal of accused 1 Satish Bhiva Jadhav and accused 3 Arun Anna Jadhav under Sections 326, 324, 323 read with 34 of the I.P.C. is set aside. Accused 1 Satish and Accused 3 Arun Anna Jadhav are sentenced under Section 325 read with Section 34 of the I.P.C. The sentence already undergone by them will be treated as sentence for this

offence.

In addition to that accused 1 Satish and Accused 3 Arun shall pay a fine of Rs.5,000/- each within a period of eight weeks from today. In default of payment of fine, they shall undergo R.I. for six months each.

The appeal is disposed of".

(SMT. RANJANA DESAI, J.)

(A. S. OKA, J.)